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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/628,033	07/25/2003	Paul Harold Bryson	66140P029	3354

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BLAKELY SOKOLOFF TAYLOR & ZAFMAN
1279 OAKMEAD PARKWAY
SUNNYVALE, CA 94085-4040

EXAMINER	
YU, GINA C	

ART UNIT	PAPER NUMBER
1617	

MAIL DATE	DELIVERY MODE
08/10/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/628,033	BRYSON ET AL.	
	Examiner	Art Unit	
	Gina C. Yu	1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *25 October 2006*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1 and 4-15* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1 and 4-15* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Receipt is acknowledged of response filed on October 26, 2007. Claims 1-15 are pending. Claim rejection made under 35 U.S.C. § 102 (b) as indicated in the previous Office action dated October 10, 2006 is withdrawn in view of applicants' remarks. Claim rejections made under 35 U.S.C. § 103 (a) as indicated in the same rejection is maintained for the reasons of record. New rejection is made.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 4, 5, 7 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Clarke et al. (US 4818523).

Clarke et al. disclose a hair-conditioning composition comprising 0.50 % of a glycol (propylene glycol), 1 % of a silicone (cyclomethicone), 1 % of a quaternium (dodecyl trimethyl ammonium chloride), and a polymeric thickener (hydroxyethylcellulose). See Example 2; col. 9, lines 20 – 52; instant claims 1 and 7

The composition also comprises Germaben II, which is a mixture of parabens. See instant claim 13. The reference teaches making the composition in the range of pH 3-4. See col. 9, lines 20-51. See instant claims 1 and 4. Less than 1 % of an alpha-hydroxy acid includes zero content of the component. See instant claim 5. See also col. 8, lines 44 – 48, which teach using citric acid to adjust pH if needed.

The reference teaches that cyclic or linear silicone is used in amount of about 0.5 – 1.5 %, which is within obvious range of the lower limitation of the claimed range. See

col. 6, lines 41 –58. Generally, differences in concentration or temperature will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." See In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). In this case, there is no criticality seen in modifying the weight amount of silicone from 1.5 % to 2 %. Given the teaching of the prior art, the skilled artisan would have discovered the optimum weight amount for the silicone by routine experimentations.

Claims 1, 4, 6-9, 11-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Espinoza (US 6709773 B2) in view of Flick (Cosmetic and Toiletry Formulations, 1997).

Espinoza teaches multivesicular emulsion drug delivery composition. The reference teaches using a mixture of behenyltrimonium methosulfate and cetearyl alcohol as an emulsifier. See col. 2, line 61 – col. 3, line 60. See instant claims 9 and 11. The reference illustrates an alpha hydroxy acid (AHA) cream comprising 83.5 % of water, 3 % of butylenes glycol, 3 % of Incroquat Behenyl TMS (behenyltrimonium methosulfate 25 %), cetyl alcohol, and sesame oil (vegetable oil). See instant claims 1, 6, 7, 9, 11. A sample sunscreen lotion formulation contains 3 % of Incroquat Behenyl TMS, 4 % of glycerin, 66.2 % of water, and avocado oil. See instant claims 1, 6, 11-13. Glycols including glycerin, propylene glycol, and butylene glycol are also taught as solvent and moisturizers in col. 5, lines 3-10 and lines 37 – 55, and used in sample

formulations. Preservatives including parabens are taught in col. 5, lines 24 – 37. The reference also teaches that moisturizers dimethicone and cyclomethicone are used in 1 % and 5 %,, respectively, by weight of a composition. See Self-tanning cream in col. 6, line 62 – col. 7, line 9; col. 5, lines 38 – 56.

While the specific examples employ cetyl alcohol and stearyl alcohol, which function as viscosity modifier, the reference also teaches in the specification polymeric viscosity modulator such as hydroxyethylcellulose, xanthan gum, and veegum. See col. 4, line 55 – col. 5, line 2. See instant claims 1, 6, and 15. It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the composition of the sample formulation by adding the polymeric viscosity modifiers as taught by the reference to adjust the viscosity of the composition.

Espinoza does not specifically teach the pH of the prior art compositions. The reference mentions that hydroxyethylcellulose is compatible with strontium nitrate and is stable at pH values around 3, which implies the suitable pH range of the prior art compositions. See col. 5, lines 1-2.

Flick teaches to adjust pH of a glycolic acid moisturizing lotion to 3.0-3.5. See p. 209, AHA Moisturizing Lotion. See instant claims 1, 4, and 15.

It would have been obvious to one of ordinary skill in the art at the time of the present invention to adjust the pH of the AHA cream composition of Espinoza to 3.0 – 3.5, as motivated by Flick, because the latter also teaches a glycolic acid lotion composition. The skilled artisan would have had a reasonable expectation of

successfully producing a glycolic acid cream composition with a pH that is suitable for topical application and stabilizes the composition.

The claimed method of topically applying the cream composition by rubbing and leaving-on the composition on the skin is an obvious use of the topical product. See instant claim 15.

Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Espinoza and Flick as applied to claims 1, 4, 6-9, 13-15 as above, and further in view of Cosmetics Additives (1991).

The Espinoza reference and the formulation on p. 209 of Flick fail to teach the viscosity modulators of instant claim 10.

Flick teaches in the same reference a W/O cream formulation which comprises almond oil and propylene glycol dicaprylate/dicaprate. See page 150. However, the combined references fail to teach a specific motivation to select these ingredients.

Cosmetics Additives teaches that propylene glycol dicaprylate/dicaprate is a luxuriant emollient, moisturizers with excellent lubricity and non-oily skin deposition for creams and lotions. See p. 415; instant claim 10.

It would have been obvious to one of ordinary skill in the art at the time of the present invention to modify the composition of the combined references by adding propylene glycol dicaprylate/dicaprate as motivated by Cosmetics Additives because the latter teaches that it provides luxuriant emolliency and non-oily skin deposition of the cream composition. The skilled artisan would have had a reasonable expectation of

successfully producing a stable skin cream composition with enhanced emolliency and skin feel.

Response to Arguments

Applicant's arguments filed on July 25, 2006 have been fully considered but they are not persuasive in part.

Applicant's argue that the prior art range "about 0.5 % - 1.5 %" does not disclose approximate range of the upper limit. Examiner finds the argument persuasive. Applicants' argument that Atofina v. Great Lakes Chemical Corp. applies to the present case is moot. See Case No. 05-1350, page 15 (Fed. Cir., March 23, 2006).

With respect to the obviousness rejection, applicants ask the which portion of the Espinoza and Flick references teach polymer viscosity modulator. As indicated in the rejection, Espinoza teaches in col. 4, lines 55-col. 5, line 2, hydroxyethylcellulose, xanthan gum, and veegum.

As also indicated in the rejection, examiner reiterates that Espinoza also suggests to formulate the composition having pH around 3, which is within "less than 3.5".

It is not clear why applicants believe that Espinoza and Flick are improperly combined and may not be combined. As indicated in the rejection, both Espinoza and Flick are directed to AHA cosmetic compositions. Applicants' argument is unpersuasive for lack of support.

Conclusion

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gina C. Yu whose telephone number is 571-272-8605. The examiner can normally be reached on Monday through Friday, from 8:00AM until 5:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

GYU

Gina C. Yu
Patent Examiner